

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & Affidavit of Filing

77-1433

To be argued by
RONALD G. RUSSO

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1433

UNITED STATES OF AMERICA,

Appellee.

—against—

THOMAS PAUL DEXTER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
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(Of Counsel).*

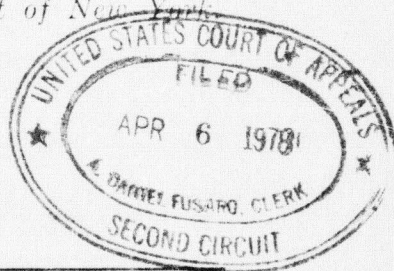


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BRIEF FOR THE APPELLEE

Preliminary Statement

Thomas Paul Dexter appeals from a judgment of the United States District Court for the Eastern District of New York (Pratt, J.) entered on May 10, 1977, convicting him, after a jury trial, of attempting to rob a bank in violation of Title 18, United States Code, Section 2113(a). Dexter was sentenced to an eight year jail term and was eligible for parole after one month pursuant to Title 18, United States Code, Section 4205(b)(4).

On this appeal Dexter's sole claim is that he was deprived of effective assistance of counsel due to his lawyer's request that the trial court not charge the jury on the defense of insanity.

Statement of Facts

The uncontroverted testimony elicited during the two-day trial established that on Friday, November 19, 1976 at approximately 6:30 P.M. an individual—later found by the jury to be Dexter—entered the West Islip Branch of the Manufacturers Hanover Trust Company wearing a ski mask (Tr. 33-35, 50-51, 84).¹ Mrs. Elenor McCabe, a teller at the bank, testified that the masked individual walked up to her window and stated "Give me the money" (Tr. 51). The would-be robber then repeated his demand—"Give me the money, I'm not fooling" (Tr. 53-54). When the teller, who was too frightened to move, failed to comply with Dexter's demand (Tr. 54), he turned on one of the customers and stated "make a move and I'll blow your brains out" (Tr. 66). He then turned his attention back to the teller's window. By this time Mrs. McCabe had gotten down under the teller's counter (Tr. 54). Dexter then attempted to kick open the door to the teller's area (Tr. 68, 87). The door would not open and Dexter exited the bank (Tr. 87). Although it was later determined that the defendant was unarmed, he had kept one hand in his jacket pocket during the entire period he was in the bank (Tr. 54, 65, 86).

When Dexter left the bank, two customers went to the door and saw him "running fast" across the parking lot adjacent to the bank (Tr. 68, 70). Mr. Joseph McHugh, one of the customers, testified that he left the bank and chased the man across the lot and tackled him some distance away from the bank (Tr. 70-74). Mr. Lars Mord, the other customer, gave substantially the same account of the pursuit of Dexter (Tr. 87-89). Dexter was subdued by McHugh and Mord on the other side of the parking lot and was taken into custody by Police

¹ All references are to the trial transcript.

Officer Michael Hurley at the scene shortly thereafter. Both McHugh and Mord testified that due to the lighting conditions, the speed with which everything happened and the confusion at the time of these events, they were unable to identify Dexter as the individual they apprehended (Tr. 73, 91). However, each was quite certain that the individual arrested by Officer Hurley was the same individual who had attempted to rob the bank (Tr. 74, 91-92). Officer Hurley then testified that the individual he arrested in the parking lot on November 19, 1976 was, indeed, Thomas Paul Dexter (Tr. 103).

The defense case consisted of placing in evidence a number of hospital reports indicating that the defendant had been diagnosed as "paranoid" (Tr. 119) and had had "a schizophrenic episode" (Tr. 119); the reports also contained other general references to Dexter's alleged physical, psychological or psychiatric problems. The jury was also told that Dexter's record at Good Samaritan Hospital, where he had been hospitalized for a urinary tract infection, indicated that he was discharged on November 19, 1976 with the entry "Condition on discharge good. Prognosis good." (Tr. 135).

On rebuttal the Government called a Mr. Michael Bellizzi, who testified that on January 24, 1977, the defendant, in concert with another man robbed the coin shop in which Bellizzi was then working. Bellizzi testified that both men entered the store, Dexter's cohort drew a gun and took coins from the store (Tr. 141). Both men were apprehended by police as they exited the shop. The jury was instructed that Bellizzi's testimony was admitted for the limited purpose of elucidating defendant's state of mind or intent on November 19, 1976 (Tr. 138).

Following the trial, colloquy took place in the absence of the jury. The Assistant United States Attorney requested that the court charge the jury as to the standards which must be met to establish an insanity defense:

"... in light of the testimony that has come in and the inferences that I think are quite obvious from the reading of the record, I would request and the Government would move for an intoxication and insanity charge so that the jury will be wholly apprised of what constitutes insanity and at what point such a defense is in fact established" (Tr. 148-48).

Counsel, when questioned by the court below as to his position on whether an insanity charge should be given to the jury, stated in part:

"We did not have any testimony from experts or psychiatrists and the like that would indicate the defense is claiming that on November 19, the defendant was insane or on that particular date he was too incapacitated to appreciate the nature of his crime or to conform his conduct to what the law requires" (Tr. 148-49).

An insanity charge was not given and defendant was found guilty as charged.

ARGUMENT

Appellant Was More Than Adequately Represented At Trial.

The sole point argued on this appeal is that appellant was deprived of the effective assistance of counsel below due to his attorney's failure to agree with the Government's request that the jury be instructed as to the elements of an insanity defense. It is respectfully submitted that counsel's position below on this point was not only proper but was the only position appellant could take given the overwhelming evidence of guilt and the paucity of psychiatric evidence. Thus, defense counsel's

decision not to agree to an insanity instruction was clearly in appellant's best interest.

It should be obvious that, contrary to appellant's arguments here, the prosecutor did not request an insanity charge out of any interest in seeing the defendant acquitted, but rather because defense counsel below had chosen a wise trial strategy. Perceiving that there was insufficient testimony to establish an insanity defense, defense counsel attempted to put the issue before the jurors without their being advised as to the extremely strict standards required to establish such a defense. Any argument that a jury might have found defendant the victim of an irresistible impulse should be dismissed out of hand. No such evidence appears anywhere in the record. Likewise any argument that defendant did not know right from wrong when he robbed the bank would be very difficult to support, especially in light of the testimony that he used a mask and fled the scene after the robbery. It is respectfully submitted that, in light of the evidence at trial, counsel did more than adequate advocacy requires.²

Furthermore, even if counsel did not proceed in the best manner possible, an assumption contradicted by the entire record, appellant has wholly failed to meet the standards of this Court which would warrant a reversal for ineffective assistance of counsel. This Court has repeatedly stated that, in order for a claim of ineffective assistance of counsel to prevail in the Second Circuit, it must be shown that the representation of the defendant

² It should also be noted parenthetically, that appellant's brief contains the apparently boiler-plate charge that there was "a fledgling or inexperienced lawyer" below. In fact counsel below was Edward Kelly, Esq. the Chief Attorney of the Eastern District Federal Defenders Unit, an accomplished lawyer with many years practice at the Federal bar.

at trial was "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Li Puma v. Commissioner, Department of Corrections, State of New York*, 560 F.2d 84 (2d Cir. 1977); *United States v. Medico*, 557 F.2d 309, 318 (2d Cir. 1977). And, in this connection, it is well settled that "'proof of the efficiency of such assistance lies in the character of the . . . proceedings . . .'" *Wojtowicz v. United States*, 550 F.2d 786, 792 (2d Cir. 1977), quoting *United States v. Wight*, *supra*, 176 F.2d at 379. It is clear that, whether viewed through the *Wight* test or any other standard, *Rickenbacker v. Warden, Auburn Correctional Facility*, 550 F.2d 62, 65-66 (2d Cir. 1976), the record in this case demonstrates that appellant was effectively represented. In sum, counsel on appeal has done little more than allege that he would have tried the case differently. Indeed, the different tactic suggested on appeal might well have ensured a speedier conviction of appellant. The fact is, however, that differing views over trial tactics and strategy do not amount to grounds for reversal, *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963), especially where, as here, the record shows that the defendant was well represented despite the enormous evidence that pointed to his guilt.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
April 3, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Kelvin Outlaw being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of April 19 78 he served a copy of the within
Brief for the appellee

by placing the same in a properly postpaid franked envelope addressed to:
Joel J. Ziegler, Esq., 12 Bank Avenue, Box 829, Smithtown, N.Y. 11787

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East,
Borough of Brooklyn, County
of Kings, City of New York.

Kelvin Outlaw

Sworn to before me this

6th day of April 19 78

Barbara Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979